REDACTED

CV-19-324

IN THE ARKANSAS COURT OF APPEALS

ST. BERNARDS COMMUNITY HOSPITAL
d/b/a CROSSRIDGE COMMUNITY HOSPITAL — APPELLANT

v. NO. CV-19-324

TERRY CHENEY, IN HIS CAPACITY AS
SPECIAL ADMINISTRATOR OF THE
ESTATE OF SANDRA CHENEY, DECEASED — APPELLEE

ON APPEAL FROM THE
CIRCUIT COURT OF CROSS COUNTY, ARKANSAS
THE HONORABLE E. DION WILSON, CIRCUIT JUDGE

APPELLEES' SUPPLEMENTAL ABSTRACT AND BRIEF
(REDACTED)

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COUNTER STATEMENT OF THE CASE

Sandra Cheney was a 49 year old wife and mother. On Sunday, January 24, 2016 at 7:00 am, Mrs. Cheney presented to the emergency department at Cross Ridge Community Hospital (hereinafter "Appellant") with severe flank pain and nausea. The nursing staff and physicians assessed Mrs. Cheney and ordered a CT exam, revealing a 6mm ureteral stone which was obstructing the flow of urine to such extent the kidney was enlarged. This resulted in a very high risk of renal failure and severe infection, including sepsis. Despite this fact, Mrs. Cheney was sent home. The following Monday morning, Mrs. Cheney immediately followed up with her primary care physician. This physician readmitted Mrs. Cheney to Appellant's facility. Again, the danger of the 6 mm ureteral stone was not recognized. Mrs. Cheney later lapsed into acute renal failure, respiratory failure and septic shock. Mrs. Cheney was intubated and transferred to St. Bernard's Hospital in Jonesboro where she died on January 28, 2016 due to complications from the kidney stone.

Terry Cheney, husband and Special Administrator of the Estate of Sandra Cheney, filed a wrongful death suit against Appellant and others. Add. 1, 265. Appellant provides the procedural history thereafter in its statement. Appellant also contends that it "explained" that it satisfies Arkansas' eight factor test for charitable immunity and because Appellee failed to meet proof with proof and proposed

erroneous legal interpretation of undisputed facts, Appellant was entitled to summary judgment as a matter of law. SOC 1, 4. Appellant controverts this statement. Appellee's pleadings and proof were presented to the trial court on each of the factors relevant to the charitable immunity determination. The trial court concluded that Appellant had failed to meet its burden to establish a charitable immunity defense as a matter of law. Add. 611.

Appellant concedes that Cross Ridge is a separate and distinct entity from St. Bernards Healthcare, Inc. and St. Bernards Hospital, Inc. Appellant SOC 2. Despite this fact, the affidavit and testimony of Mr. Hutchinson submitted in support of Appellant's motion relied extensively on documents and financial information related to those two separate entities. Add. 61-64. Appellant offers as "additional support" previous trial court orders granting summary judgment to those two separate entities. Add. 65-79, SOC 2. The orders are of varying dates, one dating back 18 years. Add. 76-79. The orders provide no insight into the actual issues being litigated, and four were "unopposed orders." Add. 65-68, 71-72, 75. Two others demonstrate that the only issue in dispute was whether charitable immunity should be abolished in its entirety. Add. 69-70, 73-74. Appellee controverts Appellant's position that the orders or financial documents related to separate and distinct entities support Appellant's assertion of charitable immunity.

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ARGUMENT

I. INTRODUCTION

Appellant filed a Motion for Summary Judgment on the basis of charitable immunity and has the burden of establishing the defense as a matter of law. The denial of Appellant's motion for summary judgment is not a final, appealable order. Appellant failed to meet its burden because genuine issues of material fact remain to be litigated and reasonable minds might reach other conclusions from those facts. The trial court should be affirmed.

II. POINTS ON APPEAL

A. THE TRIAL COURT'S DENIAL OF APPELLANT'S SUMMARY JUDGMENT MOTION IS NOT A FINAL, APPEALABLE ORDER

Appellant relies solely upon Rule 2(a)(2) of Ark. R. App. P. Civ. for the basis of this appeal. Arg. 5. This rule provides that an appeal may be taken from "an order which in effect determines the action **and** prevents a judgment from which an appeal might be taken, **or** discontinues the action." Id. (Emphasis added). The issue on appeal is whether the trial court committed reversible error in denying Appellant's Motion for Summary Judgment. This ruling did determine the action in a manner which prevented a judgment from which an appeal might be taken or discontinue the action. There has been no order, (or request) for certification pursuant to Ark. R. Civ.

P. 54(b). This case has not yet been set for trial. Based upon the guidance from this court in Neal v. Davis Nursing Ass'n, 2015 Ark. App. 478, 470 S.W.3d 281 (2015), and the Arkansas Supreme Court's subsequent decision in Davis, the charitable immunity issues will be bifurcated at trial from the underlying medical malpractice case. Appellant may succeed at trial on the merits, or in the alternative, may appeal a final, adverse judgment. Appellant attempts to rely upon language from the dissent in White River Health Systems, Inc. v. Long, 2018 Ark. App. 284, 551 S.W.3d 389 (2018), for the proposition that an order denying a motion for summary judgment must simultaneously order bifurcation of the trial. In White River, the order did just that because the ruling on the summary judgment motion occurred at a hearing on the eve of trial. In the present case, however, the denial of Appellant's motion occurred before a trial setting had even been requested. Moreover, Appellant has filed no motion for bifurcation or made any other bifurcation request to the trial court, but Appellee would agree to any such request should Appellant elect to do so.

Appellant also misconstrues Justice Harrison's dissent in White River by representing that it stands for the proposition that the bifurcation must be simultaneous with the order. Justice Harrison actually opined that the bifurcation of the trial process lacks jurisdictional significance. Id. at 9, 551S.W.3d at 393. Justice Harrison further opined that it would have been more appropriate for the majority to

have pronounced that motions for summary judgment seeking charitable immunity that had been denied because material facts are in dispute can no longer be immediately appealed, expressly overruling cases which have held otherwise on this jurisdictional point. Id. at 8, 551 S.W.3d at 393.

The denial of a motion for summary judgment is generally not an appealable order. Rick's Pro Dive'N Ski Shop, Inc. v. Jennings-Lemon, 304 Ark 671, 672, 803 S.W. 2d 934, 935 (1991). Ark. R. App. P. Civ. 2(a)(10) sets forth the very limited situations where the denial will be appealable, and specifically limits those situations to sovereign immunity or the immunity of a government official. The drafters of this rule could have, but did not, extend the exception to charitable immunity.

The right of immunity from suit has not been effectively lost just because a jury must first resolve disputed questions of facts regarding the factors that the circuit court must consider when determining the ultimate issue of charitable immunity. White River Health Systems, Inc. v. Long, 2018 Ark. App. 284 551 S.W. 3d 389 (2018). The general rules regarding summary judgments apply and the denial of Appellant's motion is neither reviewable nor appealable. Id.

Appellant relies upon the Arkansas Supreme Court's recent decision in Davis Nursing Ass'n v. Neal, 2019 Ark 91, 570 S.W. 3d 457 (2019) for the proposition that an appeal may be taken from any denial of a claim of immunity from suit. Davis is

factually distinguishable in it did not involve a motion for summary judgment, but instead followed a jury verdict, entry of judgment and denial of a motion for new trial. The purpose of a final order is to avoid piece meal litigation.

Appellant cites no other rule for the basis of Appellate jurisdiction, but does cite cases relying upon sovereign immunity. Sovereign and charitable immunity are distinct defenses. Sovereign is specifically referenced in the Appellate rules as an exception to the final order requirement, charitable is not.

To the extent prior precedent is inconsistent with the final order rule as it relates to orders denying motions for summary judgment asserting charitable immunity, the precedent should be reconsidered in light of the bifurcation of the charitable issue from the medical malpractice claim as recognized recently in both Davis and White River Health Systems, Inc. v. Madeline Long, 2018 Ark. App. 284, 551 S.W. 3d 389 (2018), as well as the long standing precedent related to final orders and the non-appealable status of denials of summary judgment motions.

B. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT

1. The Standard of Review is De Novo.

On appeal, the trial court's denial of summary judgment is reviewed *de novo.* Ark. Elder Outreach of Little Rock, Inc. v. Thompson, 2012 Ark. App. 681, 5, 425

S.W.3d 779, 783 (2012). The ultimate question of charitable immunity is a matter of law for the court to decide. Davis Nursing Ass'n v. Neal, 2019 Ark. 91, 6, 571 S.W.3d 457, 461 (2019). If the existence of charitable immunity, however, depends upon disputed factual issues, those facts should be submitted to the jury for determination. Id. Thus, the application of the defense of charitable immunity is a mixed question of fact and law.

Summary judgment may be granted only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, clearly show that there are no genuine issues of material fact to be litigated and the party is entitled to judgment as a matter of law. Mercy Health Sys. of Nw. Ark., Inc. v. Bicak, 2011 Ark. App. 341, 6, 383 S.W.3d 869, 873 (2011). Summary judgment should be denied if reasonable minds might reach different conclusions. Progressive Eldercare Servs.-Saline, Inc. v. Cauffiel, 2016 Ark. App. 523, 2, 508 S.W.3d 59,62 (2016). The review is not limited to the pleadings, and the appellate courts focus on all of the documents filed by the parties. Id. at 2–3, 508 S.W.3d at 61–62 (2016). The object of summary-judgment proceedings is not to try the issues but to determine whether there are any issues to be tried, and if there is any doubt whatsoever, the motion should be denied. Flentje v. First Nat'l Bank of Wynne, 340 Ark. 563, 569–70, 11 S.W.3d 531, 536 (2000).

The heavy burden of proving the affirmative defense of charitable immunity is on the party asserting it. Ark. Elder Outreach of Little Rock, Inc. v. Thompson, 2012 Ark. App. 681, 7, 425 S.W.3d 779, 784 (2012). Because the doctrine results in a limitation of responsible persons whom an injured party may sue, the Court gives the doctrine a very narrow construction. Id; See also Davis Nursing Ass'n v. Neal, 2019 Ark 91, 5, 571 S.W. 3d, 457, 460 (2019), citing Williams v Jefferson Hospital Ass'n, 246 Ark. 1231, 442 S.W. 2d, 243 (1969). Applying this narrow construction, in deciding whether a party has met its heavy burden of proving charitable immunity, the Court must also view the evidence in a light most favorable to the party against whom the motion was filed. Jackson v. Sparks Reg'l Med. Ctr., 375 Ark. 533, 529, 294 S.W.3d 1, 4-5 (2009).

2. Disputed Factual Issues with Respect to the Defense of Charitable Immunity Preclude Summary Judgment.

Arkansas is one of a distinct minority of states that still cling to the defense of charitable immunity, even though the original justification for charitable immunity—protection of funds given to the charity from judgments—has long since become outmoded. George v. Jefferson Hosp. Ass'n, Inc., 337 Ark. 206, 217–18, 987 S.W.2d 710, 716 (1999) (Justice Brown Dissenting); citing RESTATEMENT OF TORTS SECOND § 895E, p. 420; and "The Quality of Mercy: 'Charitable Torts' and

their Continuing Immunity." 100 HARVARD LAW REVIEW 1382 (1987).

When determining whether a corporation is entitled to charitable immunity, Arkansas Courts consider eight factors: (1) whether the organization's charter limits it to charitable purposes; (2) whether the organization's charter contains a "not-for-profit" limitation; (3) whether the organization's goal is to break even; (4) whether the organization earned a profit; (5) whether any profit must be used for charitable purposes; (6) whether the organization depends on contributions and donations for its existence; (7) whether the organization provides its services free of charge to those unable to pay; and (8) whether the directors and officers receive compensation. Davis Nursing Ass'n v. Neal, 2019 Ark. 91, 6, 570 S.W. 3d 457, 461 (2019). These factors are illustrative, not exhaustive, and no single factor is dispositive of charitable status. Downing v. Lawrence Hall Nursing Ctr., 2010 Ark. 175, 10, 369 S.W.3d 8, 14 (2010). Appellee agrees that a charitable immunity determination is based on the "totality of the relevant facts and circumstances." This necessarily includes the weighing of the relevant facts which can only occur after there has been a determination of the facts and circumstances by the trier of fact.

In 2012, this Court concluded that whether the charitable-entity form has been abused is also a "pivotal issue" in determining entitlement to charitable immunity. Watkins v. Ark. Elder Outreach of Little Rock, Inc., 2012 Ark. App. 301, 12, 420

S.W.3d 477, 484. In Watkins, an estate appealed from a trial court's granting of a summary judgment based upon charitable immunity. Id. at 1, 420 S.W. 3d at 479. The corporation's Articles provided that it was a not-for-profit corporation and tax-exempt organization. Id. at 3, 420 S.W.3d at 479. The corporation submitted an affidavit stating it accepted patients that could not pay, did not earn a profit and any surplus was used to operate/ improve the nursing and facility services and to offset cost of residents who were unable to pay. Id. at 3, 420 S.W.3d at 480. The affidavit stated the corporation's goal was to break even. Id. The Court found disputed facts and reversed the trial court. Id. at 13, 420 S.W.3d at 485. The Court noted a pivotal issue was whether the charitable-entity form had been abused. Id. at 11, 420 S.W.3d at 485. The Court also reasoned there was a question of fact as to whether certain expenses could be considered reasonable. Id. at 12, 420 S.W.3d at 485.

Since the Watkins decision, the Arkansas Court of Appeals has affirmed a trial court's denial of summary judgment on the issue of charitable immunity numerous times. See Progressive Eldercare Servs.-Saline, Inc. v. Cauffiel, 2016 Ark. App. 523, 508 S.W.3d 59 (2016); Progressive Eldercare Services–Bryant, Inc. v. Price, 2016 Ark. App. 528, 1 (2016); Progressive Eldercare Servs.-Saline, Inc. v. Garrett, 2016 Ark. App. 518, 1 (2016); Progressive Eldercare Servs.-Saline, Inc. v. Krauss, 2014 Ark. App. 265, 1 (2014); Ark. Elder Outreach of Little Rock, Inc. v. Nicholson, 2013

Ark. App. 758, 1 (2013); Ark. Elder Outreach of Little Rock, Inc. v. Thompson, 2012 Ark. App. 681, 425 S.W.3d 779 (2012). This court has also reversed trial courts' decisions to grant summary judgment on charitable immunity. See Neal v. Davis Nursing Ass'n, 2015 Ark. App. 478, 8, 470 S.W.3d 281, 286 (2015); Carnell v. Ark. Elder Outreach of Little Rock, Inc., 2012 Ark. App. 698, 425 S.W.3d 787 (2012).

The charitable immunity doctrine has been significantly narrowed by the Arkansas Appellate Courts in the past decade. As recently as May 2018, this Court dismissed an appeal challenging a trial court's denial of a Motion for Summary Judgment asserting the charitable immunity defense. See White River Health Systems, Inc. v. Madeline Long, 2018 Ark. App. 284, 551 S.W. 389 (2018).

The Arkansas Supreme Court recently addressed the role of the trial court and jury in determining charitable immunity defense issues. Davis Nursing Ass'n v. Neal, 2019 Ark. 91, 570 S.W.3d 457 (2019). The Supreme Court held that the ultimate question of charitable immunity is a matter of law for the Court to decide. Id. at 6, 570 S.W.3d at 461. However, if the existence of charitable immunity turns on disputed factual issues, these facts should be determined by the jury. Id. The trial court will then determine whether those facts are sufficient to establish charitable immunity. Thus, where, as here, there are disputed factual issues with respect to the defense of charitable immunity, those questions of facts preclude summary judgment.

a. Appellant's statements of charitable purpose and not for profit status in organizational documents are not determinative of the issue.

The first two factors the Court should consider is whether Appellant's organizational documents limit it to charitable or eleemosynary purposes or contains a "not for profit" limitation. These are normally the two easiest factors for the party seeking immunity to satisfy. Appellant's mere status as a nonprofit organization is only one factor to be considered in determining whether it is entitled to charitable immunity. Masterson v. Stambuck, 321 Ark. 391, 400-01, 902 S.W. 2d 803, 809,10 (1995). (adopting the eight factors for establishing charitable status); Downing v. Lawrence Hall Nursing Ctr., 2010 Ark. 175, 11, 369 S.W.3d 8, 15 (2010).

Appellant relies on its Bylaws and Articles of Incorporation. Add. 118-119,120-131. The Bylaws state that Appellant has powers granted by the Ark. Non-Profit Corp. Act of 1993, ". . . except as such powers may be otherwise modified hereby by the Articles of Incorporation of this corporation." Add. 123. The Bylaws also provide that they may be ". . . altered, amended or repealed and new bylaws may be adopted by majority of the board by any regular or special meeting of the board." Add. 131. The Articles authorize payment of reasonable compensation to its directors, officers or other private persons. Add. 123. As detailed in Section (f), *infra*, Appellant's officers were highly compensated.

In Masterson v. Stambuck, the Arkansas Supreme Court reversed a trial court's decision that a utility company was entitled to charitable immunity even though it had been created for charitable purposes. The Arkansas Supreme Court noted although Conway Corporation was created for charitable purposes, its directors had the authority to amend its articles of incorporation. 321 Ark. 391, 402, 902 S.W.2d 803, 810 (1995). Appellant's Bylaws reflect that the powers may be modified by either the Bylaws or the Articles in the future. Add. 131.

The Court in Masterson noted while the corporation had aided educational institutions, it also purchased trucks, land and had other expenditures not explicitly authorized in the articles. 321 Ark. 391, 402, 902 S.W. 2d 803, 810 (1995). Hutchinson specifically admitted in his affidavit Appellant had a surplus of funds and reinvests its surplus to, among other things, stay abreast of new technology and purchase "state of the art" equipment. Add. 63. The Court in Masterson held that even if a corporation's articles limit it to charitable purposes, unless an entity performs as its articles state, it will not be entitled to charitable immunity. Id. Whether Appellant has performed as its Articles state is a question of fact.

In Watkins, the party claiming charitable immunity presented articles of incorporation stating it was a not-for-profit corporation and tax-exempt organization. Watkins v. Ark. Elder Outreach of Little Rock, Inc., 2012 Ark. App. 301, 420

S.W.3d 477, 484. Nevertheless, the Court found there were disputed facts and reversed the trial court's decision to grant summary judgment on the issue of charitable immunity. Id. A similar analysis is appropriate in the present action.

b. Appellant has presented no proof that its goal is to break even and Appellee has presented evidence that Appellant earns a profit.

The third factor to consider is whether Appellant has presented indisputable proof that its goal is to break even. The fourth factor to consider is whether Appellant earned a profit. Appellant's revenue less expenses for 2016 were [redacted]. Add. 404. SBHI's revenue less expenses for 2015 were [redacted]. Add. 315. Appellant combines factors three and four in its argument section and then skips any factual discussion of factor three by simply stating that a goal to break even is not a dispositive factor.

Despite submitting an affidavit and a 30(b)(6) witness, Appellant could not, and did not, represent that its goal was to break even. Add. 61-64. In his affidavit, Mr. Hutchinson does not even attempt to claim that Appellant's goal is to break even. Add. 61-64. The evidence is to the contrary. Appellant expects to, and does, generate a surplus profit. Appellant's Articles anticipate that the corporation will earn a profit. Add. 118-119. The Articles state that "No part of the net earnings of the corporation shall inure to the benefit of, or be distributable to, its directors, officers, or other

private person, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payment and distribution in furtherance of the purposes set forth above." Add. 118. (emphasis added). Moreover, as established below, Appellant and SBHI earned a significant profit based upon the evidence before the Court. Thus, Appellant has not met its burden of establishing that its goal is to break even, and this factor instead supports the denial of Appellant 's motion. As further discussed in section III, *infra*, Appellant also refused payment sources from Medicare, Medicaid, private insurance, and others for patients who were unable to pay so as to pursue efforts through a debt collector to obtain higher rates of compensation from the automobile insurance carrier. This practice weighs strongly against the lack of a profit motive or a goal to break even.

Mr. Hutchinson admits in his affidavit that Appellant actually transfers a significant portion of year end revenue to SBHC. Add. 63, fn 2. Mr. Hutchinson's affidavit goes back and forth between Appellant, SBHC and SBHI because the entities' finances are so intertwined. Add. 61-64. SBHI shows a total revenue of [redacted] in 2015. Add. 315. In the two years proceeding this incident, the revenue, **after expenses** were [redacted] and [redacted]. Add. 315. As of September 30, 2016, SBHI's cash and cash equivalents [redacted]. Add. 170. SBHI's total assets exceed [redacted]. Add.

161. Appellant's own financial documents demonstrate total assets of [redacted], [redacted] of which is cash. Add. 84.

Mr. Hutchinson admitted in his affidavit that Appellant's 2015 revenues exceeded direct expenses by [redacted]. See Add. 63, fn 2. He also states these profits were transferred to SBHC for "payroll, accounts-payable invoices and management fees." See Add. 63. Hutchinson contradicted this affidavit in his deposition by stating that Appellant does not pay management fees. See Ab. 9. As detailed in section (f), *infra*, Appellant was actually compensating officers, including Mr. Hutchinson and Mr. Barber, in significant amounts. The affidavit is a clear admission that Appellant generated a significant surplus in 2015. Add. 61-64. Hutchinson's affidavit admits that Appellant showed a profit over each of the three years analyzed, even though profit calculations included the deduction for bad debt/charitable charity. Add. 61-64. Mr. Hutchinson also admits SBHC and SBMC likewise show profit margins over the three year period. Add. 61-64

Appellant cites George v. Jefferson Hospital Ass'n, 337 Ark. 213, 987 S.W. 2d 713 (1999). George was specifically addressed in Neal, where this court noted that ". . . the lack of a profit in a long standing business could cause reasonable minds to question whether an entity is truly operating at a deficit each year or inflating its financial records to create the perception that it is operating at a deficit." See Neal,

2015 Ark. App. 341, 5, 470 S.W.3d 281, 284 (2015). The same analysis is even more applicable here, where not only does Appellant show a surplus, Appellant attempts to discount its numbers by payments to entities with joint ownership which it admits are separate and distinct. There was no proof of a goal to simply break even and the proof before the trial court demonstrated a substantial profit.

c. Appellant's Articles do not require Appellant to use its profits for charitable or eleemosynary purposes.

The fifth factor is whether Appellant's surplus must be used for charitable or eleemosynary purposes. Mr. Hutchinson's affidavit does not state that Appellant's profits are used for charitable purposes, but instead are returned to SBHI or used for typical business expenses or to acquire assets. Add. 63. Moreover, any claim by Appellant that it voluntarily reinvests its profits is insufficient. This Court in Neal v. Davis Nursing Association questioned whether reinvesting profits is sufficient to satisfy this factor. Id. In Neal, unlike here, the bylaws specifically stated that no part of its net earnings would benefit or be distributed to any of its directors, officers or any other private individuals. Id. at 5, 470 S.W. 3d at 284. Here, the Bylaws/Articles specifically allow for a portion of the net earnings to be distributed to officers or other private individuals and they are so distributed. Add. 118, 123. Even with the much more narrow restriction in Neal, this court held that a question remains whether re-

investing profit is sufficient to satisfy this factor especially if the evidence, taken as a whole, challenges the true charitable nature of the facility. Id. at 5-6, 470 S.W.3d at 284. See also Progressive Eldercare Servs.-Saline, Inc. v. Krauss, 2014 Ark. App. 265, 4 (2014) (noting that using profits for building improvements and operating expenses supported the trial court's finding that the entity was not entitled to charitable immunity). This factor strongly favors the denial of Appellant's motion.

d. Appellant does not depend on contributions and donations for its existence.

The sixth factor is whether Appellant depends on contributions and donations for its existence. Appellant does not contend that it relies upon charitable contributions and donations for its existence. Instead, Appellant contends that without sales tax revenue and government grants (as opposed to charitable donations and contributions), Appellant would "have incurred substantial losses." Arg. 23. Mr. Hutchinson, Chief Financial Officer and designated 30(b)(6) representative, does not identify any meaningful contributions or donations that were charitable in nature, much less correlate Appellant's existence to those charitable contributions or donations. See. Ab. 55-59. Supp. Ab. 1. Mr. Hutchinson admitted he could only assume that the governmental grants or sales tax revenue were dependent upon Cross Ridge's charitable status. Ab. 17; Supp Ab. 1. Appellant recognizes the lack of proof

on this issue and only states "these contributions **may** depend on Cross Ridge retaining its charitable status." Arg. 22 (Emphasis added). Mr. Hutchinson admitted that he could not answer any questions regarding the specifics on any grants that are identified in the contribution section of the tax return without additional research. Ab. 18; Supp Ab. 1. This evidence falls well short in establishing that Cross Ridge relies on charitable contributions and donations for its existence.

Even if the numbers were entirely reliable and applicable as charitable donations or contributions, they are minuscule. For SBHI 2015 total contributions, gifts and grants totaled [redacted], less than [redacted] of total revenue of [redacted]. Add. 315, 323. Appellant identified [redacted] as government grants and [redacted] as "contributions, gifts, grants and similar amounts" other than government grants. Add. 412. The non-government grant amount is less than [redacted] of total revenue. Add. 404, 412. This is also substantially lower than the yearly revenue, less expenses, of [redacted], which was calculated after Appellant had transferred "expense" monies, including compensation of officers, to SBHI. Add.404.

Mr. Hutchinson admits in paragraph 11 of his affidavit that Appellant had received significant contributions primarily through government grants. Add. 64. Appellant has produced no evidence that would allow this court to determine the specifics of those grants or whether those grants are government subsidies different

from those offered to surrounding, similarly situated for-profit hospitals. The actual amount that Appellant received in non-government, charitable contributions is substantially less. Add. 412. This court in Neal previously found the Defendant had failed to satisfy this factor regarding Defendant's receipt of **charitable** donations. Id. at 6,470 S.W. 3d at 281. (emphasis added).

Appellant cites George v. Jefferson Hosp. Ass'n, Inc., 337 Ark. 206, 987 S.W.2d 710 (1999). There, it was undisputed that the Defendant did not depend on donations for its existence when the donations were in the range of 6% of its financial obligations. However, several other factors were conceded or otherwise not disputed. In light of the totality of circumstances presented, the Court held that the fact that the hospital's financial obligation met by donation was only 6% did not defeat its claim of charitable immunity. Id. at 214, 987, S.W.2d at 714. Recognizing that it does not rely charitable contributions or donations for its existence, Appellant simply argues that this fact is not determinative. Appellant is correct. However, this factor clearly weighs in Appellee's favor. Appellant does not depend on contributions and donations for its existence. Weighing the totality of circumstances presented, the Court properly denied Appellant 's motion.

e. Appellant does not provide free services beyond a minuscule amount.

The seventh factor to consider its whether Appellant has presented proof it

provides its services free to those unable to pay. Mr. Hutchinson's Affidavit states that Appellant voluntarily provides free and discounted services to patients who cannot afford to pay. Add. 62. Appellant relies upon the Financial Assistance Policy (FAP). Add. 148. Appellant refers to the FAP as the "charity" policy when in reality, the FAP clearly demonstrates that Appellant expects patients to pay and does not offer a "free care" program. The only reference in the FAP providing medical care to individuals regardless of their ability to pay relates to emergency medical conditions. Add. 148. Appellant is required to provide emergency care, regardless of the patient's ability to pay, pursuant to Federal law 42 U.S.C. §1395dd. ("EMTALA"). Even these patients, however, are initially billed with an expectation of payment. An emergency charge for a patient who cannot pay is classified as bad debt. Appellant's position is that it is compliance with federal law in this regard converts "bad debt" into "charity" which allows it to avoid tort liability as a charitable entity.

The FAP specifically details Appellant's billing practices. [redacted] Add. 149. [redacted] Add.

152. [redacted]. Add. 152. [redacted] This entire process initially assumes payment by the patient. Add. 153. Mr. Hutchinson admitted that patients who ultimately may be determined to have received "charitable care" are initially treated and billed the same as any other patient receiving care at the facility. Ab. 23. Thus, there is a clear practice that Appellant treats patients with the presumption they will pay. All patients are initially charged for care and only when they submit documentation that they cannot pay are the debts considered for reduction or forgiveness.

Appellant also attempts to equate the forgiveness of uncollectible debt to the providing free services. Virtually all businesses experience uncollectible debt. Even considering debt forgiveness, however, the non-payment is minuscule in comparison to Appellant's overall revenue. In the supplemental information to schedule d, line 4 (b), SBHI identified over [redacted] of "uncollectible accounts." Add. 345. SBHI also offers the following explanation with respect to schedule H, part 3 line 3:

[redacted]

[redacted] Add. 362. See also Add. 175.

Thus, SBHI "estimates" charity by re-characterizing bad debt without supporting information. Total revenue for 2015 and 2016 was[redacted] and [redacted]. Add. 163. The cost attributed to charity care for 2015 and 2016 was[redacted] and[redacted], estimated by applying the ratio of cost of gross charges to gross uncompensated charges. Add. 183. The numbers used here are actually bad debt, with no supporting documentation of charity. If a "bad debt" results in the absence of the financial assistance determination due to the lack of supporting documentation, incomplete or lack of application, there is a **presumptive eligibility** for charity despite the lack of evidence. Add. 153-154, para. 5. Hutchinson could not testify as to the amount of the alleged charitable care that actually was bad debt simply presumed to be charitable care due to lack of supporting evidence. Even using these numbers, the ratio of charity to total revenue is less than[redacted] for 2015 and [redacted]for 2016. Add. 163, 183.

Appellant's 2016 tax return shows a total revenue of[redacted] in 2016. Add. 404. Similar to SBHI, Appellant applied the same method of estimating "charitable" service by applying a ratio to bad debt. Add. 95. Even using this method, Appellant identified charitable work as[redacted], less than[redacted] of total revenue. Add. 404, 437. Comparing Add. 95 to Add. 96, Appellant reduced its cost of charity care

by over [redacted] from [redacted] in 2016 to [redacted] in 2017, even though the total revenue **increased** in 2017 from [redacted] to [redacted]. Add. 86, 95. Hutchinson admitted that the amount of charity care provided by Appellant has decreased dramatically on an annual basis due to the wide spread health coverage available through the various private and public coverage programs. Ab. 23.

Appellant also contends they do not pursue collection action or legal remedies against patients who do not pay. The FAP specifically provides that [redacted]. Add. 155. Appellant also specifically contracted with an external collection agency, MedPay Assurance, LLC (Rev Claims) to pursue collection activities. Add. 585. As discussed in Section G, *infra*, Appellant and its collection agent pursued collection activities against patients who otherwise had healthcare coverage in attempts to increase their profit margins beyond the rates Appellant had agreed to accept from its patient's providers.

In Neal v. Davis Nursing Association, much like Appellant, the party claiming charitable immunity submitted affidavit testimony that it would forgive the bad debts of those who could not pay for its services. 2015 Ark. App. 478, 470 S.W.3d 281 (2015). The Court noted that the facility admitted patients with the presumption that they would pay their bills; that all patients were initially charged for their care; and

only when they could not pay were those debts forgiven. Id at 6, 470 S.W.3d at 284. The Court also reasoned that the facility had failed to establish that forgiving debt is equivalent to providing free services. Id. The Court noted that the amount of debt forgiven was minuscule in comparison to the company's overall revenue (less than 1% in 2011, 5.76% in 2012, and 2.2% in 2013). Id. at 6, 470 S.W.3d at 285. The Court held that reasonable minds could view this minute amount of debt forgiveness as creating a facade of charity instead of a true charity. Id. This court in Progressive Eldercare Servs.-Saline, Inc. v. Krauss, 2014 Ark. App. 265, 5 (2014) previously affirmed the denial of a motion for summary judgment on the issue of charitable immunity after noting that the entity provided only $290,000 in free care which was less than 2% of its total revenue of $16,722,711.

This Court should analyze Appellant's proof in a manner that is consistent with the analysis provided in Neal. 2015 Ark. App. 478, 470 S.W.3d 281. While Appellant may not refuse emergency patients, it expects patients to pay for its services or to obtain Medicare and/or Medicaid to pay Appellant for these services. Appellant's "debt forgiveness" was [redacted] of revenue and it is disputed that this represents charity. Thus, as in Neal, reasonable minds could view this minuscule amount of "charity care" as creating a facade of charity instead of a true charity. Id. This factor weighs heavily in favor of the trial court's decision.

f. Multiple officers receive significant compensation.

The eighth factor is whether directors and officers receive compensation. Appellant's Bylaws state that "No part of the net earnings of the corporation shall inure to the benefit of, or be distributable to, its directors, officers, or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payment and distribution in furtherance of the purposes set forth above." (Emphasis added). Add.123.

When questioned during his deposition, Mr. Hutchinson initially denied that funds from Appellant were used to pay officer's compensation, including his own. Ab. 8. Yet Appellant's tax returns identify the same highly compensated officers as SBHC. Add. 322, 410. The 2016 tax return from Cross Ridge Hospital identify Mr. Hutchinson, the Chief Financial Officer, and Mr. Chris Barber, the Chief Executive Officer, as "compensated officers." Add. 410. Mr. Hutchinson eventually admitted that a portion of his compensation was paid by Cross Ridge as the chief financial officer. Ab. 11. [redacted] Add. 410.

Appellant's 2016 tax return shows reportable compensation of officers from related organizations and Appellant, Mr. Barber receiving [redacted] and Harry

Hutchinson [redacted] in compensation. Add. 447. When compared to the 2015 totals for Barber and Hutchinson, this also demonstrates an approximate [redacted] annual salary increase in 2016, the year following Appellant's surplus of [redacted]. Add. 322. There are also "management fees" paid by Appellant to SBHC noted in footnote 2 of Mr. Hutchinson's affidavit. Add. 63. Mr. Hutchinson later in his deposition contended "management fees" was "poor wording" on his part. Ab. 12.

In Neal v. Davis Nursing Association, the facility's bylaws required that its board members and officers serve without pay. 2015 Ark. App. 478, 470 S.W.3d 281 (2015). Nevertheless, the Court found that genuine issues of material fact existed as to whether the facility satisfied the factors for claiming charitable immunity defense, precluding summary judgment. Id. In this case, Appellant's Articles provide that its officers can be compensated, and its tax return reflects that officers receive significant amounts of compensation. Add. 118, 322, 410.The officers also received a large raise after a surplus in 2015. In analyzing the expenses of entities claiming charitable immunity, the Courts have consistently held that whether an expense is reasonable is usually a question of fact rendering summary judgment inappropriate. See Carnell v. Ark. Elder Outreach of Little Rock, Inc., 2012 Ark. App. 698, 425 S.W.3d 787 (2012). This factor supports the denial of Appellant's motion for summary judgment.

g. Reasonable, fair-minded persons could conclude that Appellant has

abused the charitable form.

In 2012, this Court concluded that whether the charitable-entity form has been abused is a "pivotal issue" in determining entitlement to charitable immunity. Watkins v. Ark. Elder Outreach of Little Rock, Inc., 2012 Ark. App. 301, 12, 420 S.W.3d 477, 484 (2012). In Watkins, the facility's articles of incorporation provided that it was a not-for-profit corporation and that it was a tax-exempt section 501(c)(3) organization according to the Internal Revenue Service. Id. at 3, 420 S.W.3d at 479. The facility submitted an affidavit stating that it accepted patients that could not pay and did not earn a profit and any surplus was used to operate and improve the facility and to offset the cost of residents who were unable to pay. Id. at 3, 420 S.W.3d at 480. The affidavit also stated that the facility's goal was to break even. Id. Even so, this Court found disputed facts and reversed the trial court's decision to grant summary judgment. The Court noted it was the moving party's burden to prove it was entitled to charitable immunity and the doctrine is narrowly constructed. Id. at S.W. 3d at 484. In addition to the eight factors, the Court also noted that a pivotal issue was whether the charitable-entity form had been abused. Id.

The contract between Med Pay Assurance, LLC (referred to as "Rev Claims") and SBHI provides for the collection agent to seek and recover reimbursement of medical fees related to patients who suffered injuries as a result of an accident caused

by a third party. Add. 585, Ab. 28. The agreement provides that [redacted]. Add. 585. It also provides that Rev Claims [redacted]. Add. 586. Rev Claims is paid a [redacted] fee [redacted]. Add. 586, Ab. 28. [redacted]. Add. 589. Thus, a collection agent with a clear profit motive conducts negotiations and determines whether a reduction or write off as bad debt occurs. The collection agent is motivated by profit with no charitable purpose.

Appellant works under the same agreement with Rev Claims to pursue recovery for patients involved in automobile accidents. Ab. 23-24, 28. [redacted]. Ab. 27. [redacted] Ab. 27-28. Rev Claims receives [redacted] related to Cross Ridge patients. Ab. 28. The remaining [redacted] goes back into the Cross Ridge general coffers. Ab. 28. The amount sought by Rev Claims is calculated at [redacted]

[redacted]Ab. 21-22.

The Appellant and other related St. Bernards entities have been named as Defendants in at least two separate class actions regarding their collection activities against their patients. Add. 470-524. These class actions arose from the same practice employed by Appellant here of refusing to bill available private insurance, Medicaid, Medicare or other type of coverage available to its patients who had been injured in automobile collisions, instead turning the matter over to its contracted collection agent who then initiates collection activities against the patient.

Appellant's profit motive and anti-charitable behavior is best demonstrated by its treatment of Medicaid recipients involved in automobile related injuries. Medicaid is a form of insurance coverage to allow for appropriate medical care to qualified, need based individuals, primarily the poor. The Appellant has agreed to accept Medicaid patients and the reimbursement amounts set forth by Medicaid. However, in automobile collision cases, the Appellant instead has a policy and practice to refuse to accept Medicaid payments on behalf of indigent persons involved in automobile accidents, instead turning those individuals over to its designated collection agent, Rev Claims. Rev Claims then initiates collection activity to recover from the indigent, Medicaid recipient, at the full rate for the same services rendered, which exceeds the

amount which would have been charged to Medicaid. Thus, Appellant is not providing free service to the poor, but instead is declining Medicaid coverage for the poor and seeking to recover an increased amount, either directly from the poor patient or by interjecting itself into the poor, injured person's tort claim through a subrogation lien. Regardless of the legality of such a practice, it results in a refusal to process the patient's Medicaid benefits so that Appellant can increase its profit by recovering directly or indirectly from the indigent patient. This practice clearly demonstrates a profit motive and is contrary to any charitable purpose.

Appellee submitted proof that this practice had been admitted in other litigation. Add. 470-536. For instance, in [redacted]. Add. 533. St. Bernards, Inc. and St. Bernards Community Hospital Corporation were represented by the same attorney who is representing the Appellant in this matter. Appellants "calculated choice" is to increase its profits at the expense of needs-based Medicaid recipients

who otherwise cannot pay for medical care by asserting liens and foregoing Medical reimbursement. This [redacted] is not only contrary to a "charitable purpose," it is an abuse of the charitable immunity doctrine.

In Progressive Eldercare Servs.-Saline, Inc. v. Cauffiel, 2016 Ark. App. 523, 508 S.W.3d 59 (2016), the Court affirmed a trial court's denial of a motion for summary judgment. One of the concurring opinions suggested that all eight factors can be decided for the entity seeking immunity, but as long as there is a dispute as to whether the charitable form has been abused, immunity will not be given as a matter of summary-judgment law. Id at 13, 68. Appellee submitted proof from which reasonable minds could conclude that the charitable form has been abused.

CONCLUSION

The order at issue is not a final, appealable order. Additionally, Appellant's proof is woefully insufficient to meet its heavy burden to establish it is entitled to summary judgment under the narrowly construed doctrine of charitable immunity. Reasonable, fair-minded persons could conclude that most of the relevant factors can be decided against Appellant and that Appellant has abused the charitable form. Appellant now attempts to use the charitable immunity defense as a facade to avoid a just determination of liability. For all of these reasons, this Court should affirm the Trial Court's decision to deny Appellant's Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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